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Supreme Court, U.S.
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No. 99-1581

IN THE

Supreme Court of the United States

October Term, 1999

MORTADA HIZAM,

Petitioner,

vs.

HUSSEIN MOSSA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. Does petitioner present a substantial Constitutional question for consideration by the Court?

2. Did the trial courts and state appellate courts abuse their discretion in refusing to set aside the verdict and order a new trial?

3. Was petitioner Denied Equal Protection Under the Law?

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COUNTERSTATEMENT OF THE CASE AND FACTS

This is a personal injury action in which the petitioner allegedly sustained injuries as a result of a fall from a ladder. Respondent had hired petitioner to paint his house. Petitioner had ascended a ladder and was helping respondent clean the gutters on the house. Respondent had gone into his garage to obtain additional tools when petitioner fell off the ladder. Thereafter, suit was commenced in the Supreme Court of the State of New York, Erie County, and discovery was conducted. The case proceeded to trial and the jury rendered a unanimous verdict in favor of Respondent. Petitioner made a post-trial motion to set aside the verdict, which was denied. Petitioner appealed, contending that the verdict was contrary to the weight of the evidence and that ethnic references during the trial constituted fundamental error. The Appellate Division, Fourth Judicial Department, denied the appeal and affirmed the verdict, and petitioner sought leave to appeal to the Court of Appeals of New York. Leave was denied.

Both petitioner and respondent are of Arab descent. During the trial of this case, there were several references to petitioner's, as well as respondent's, ethnic heritage. However, as petitioner failed to note, it was petitioner's counsel who introduced the ethnic theme during his opening statement, noting that his client had recently immigrated from Yemen seeking "hopes and dreams, and opportunities that this country provides and affords us." In the first moments of petitioner's opening statement, counsel stated:

> And in our society, too, we have privileges, and we have hopes, and we have dreams, and we have goals. My client, Mr. Hizam, who's sitting over there, and his wife, okay, he's from Yemen. And you'll hear that. . . . His wife . . . was born in Buffalo, but I

> think that he met her over there, and he's been here now working on three years. And he's here probably for the same reason that our ancestors came here, for purposes, hopes, and dreams, and opportunities that this country affords us. . . .
>
> So, Mr. Hizam came here two, two and a half, maybe three years ago. Gave up the security of his homeland, his family, came here. . . . Spoke no English. . . . You'll hear that he had a college degree, in Yemen, that he was a teacher there. . . . If you don't speak English, you're going to have a little trouble getting a teaching job. . . . He comes here taking odd jobs. . .doing what he can to support his family, his children, and get into our society.

Reference was made to the fact that when petitioner left his country, he did not speak any English and that his inability to speak English hampered his efforts to obtain employment when he came to this country. These issues were brought out by counsel on direct examination of petitioner, including his life in Yemen, immigration, inability to speak English, attempts to learn English, and his plans to take the United States citizenship examination. Although respondent's counsel also made reference on several occasions to the parties' ethnicity, the record reveals that these references and comments were made in direct response to observations made by petitioner's counsel in opening argument and appeal to petitioner's attempts to make a better life for himself and achieve "the American Dream." Moreover, respondent's counsel's references to regionalism and ethnicity, to which petitioner did not object during trial, were not derogatory but rather complimentary and no improper motive shoud be attributed to these comments.

Petitioner fails to note that it was petitioner's counsel who belabored the issue of petitioner's ethnicity. He can hardly be heard now to complain because the conclusion of the trial was not in his favor.

REASONS FOR DENYING THE WRIT

Even if references to ethnicity and regionalism during the trial could be interpreted as improper attempts to incite prejudice, there is no Constitutional issue which warrants granting the writ.

I. This Court Does Not Have Jurisdiction to Rectify An Abuse of the Trial Court's Discretion.

Review on writ of certiorari, like a motion to set aside a verdict as against the weight of the evidence, is a matter of judicial discretion. Rule 10 of the Rules of the Supreme Court of the United States provides that a writ of certiorari will only be granted for compelling reasons. No compelling issue has been presented for consideration by the Court. The failure to rectify any alleged improper conduct by use of a curative instruction to the jury or by setting aside the verdict does not imply an abuse of power which would give rise to a violation of the Fourteenth Amendment. It is clear that a claim for denial of Equal Protection will not lie based upon a single incident in which a trial court allegedly abused its discretion. A violation of the Equal Protection Clause relates to an abuse of power by the State to the detriment of a protected class, as illustrated by *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and *People v. Bolling,* 79 N.Y.2d 317, 582 N.Y.S.2d 950, 591 N.E.2d 1136 (1992), the cases cited by petitioner. No such pattern of conduct on the part of the New York Court System has been alleged, nor is one supported by the facts taken in a light most favorable to petitioner. In fact, the trial court was not presented with the issue of alleged improper ethnic references until post-trial motions. The allegedly improper references were not objected to during the trial and no curative charge to the jury was requested. Therefore, no Constitutional question has been presented for review by the Court.

II. The Trial Court Did Not Abuse Its Discretion.

There is no question that appeals to prejudice are an affront to our system of justice. Nevertheless, references to ethnicity, race or regionalism, standing alone, do not establish an appeal to prejudice. "When a racial or ethnic appeal has been made, the trial court 'must examine, on a case-by-case basis, the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case (e.g. whether it is a close call), and the verdict itself.' " *LeBlanc v. American Honda Motor Co., Inc.*, 141 N.H. 579, 688 A.2d 556 (1997), *quoting Forrestal, v. Magendantz,* 848 F.2d 303, 309 (1st Cir. 1988). One of the circumstances to be considered is whether the allegedly improper comments diverted the jury's attention from the issues to be determined with respect to liability as to deprive the litigants of a fair trial. *Torrado v. Lutheran Medical Center,* 198 A.D.2d 346, 603 N.Y.S.2d 325 (2d Dept. 1993). A new trial is not warranted where the comments are not inherently offensive in nature nor divert the jury's attention from the material issues in the case. *Classen v. Ashkinazy,* 258 A.D.2d 863, 686 N.Y.S.2d 164 (3d Dept. 1999); *Driscoll v. Akron Fire Co., Inc.,* 251 A.D.2d 1042, 675 N.Y.S.2d 264 (4th Dept. 1998).

In this case, the comments to which petitioner objects were not offensive in nature nor were they an appeal to prejudice. In fact, defense counsel specifically countenanced the jury that "opening statements are not evidence," and later admonished them "to be critical thinkers. You are not entitled to take emotion into consideration when you consider the evidence and make your decision." As the New York appellate court noted in its decision denying petitioner's appeal, "The alleged

improper statements were in fact innocent references to the ethnic heritage of the parties and, in any event, were fair response to statements regarding plaintiff's recent immigration made by plaintiff's attorney in his opening statement." *Hizam v. Mossa*, 265 A.D.2d 873, 695 N.Y.S.2d (4th Dept. 1999), *lv. denied* 94 N.Y.2d 757, 725 N.E.2d 1094, 704 N.Y.S.2d (1999). The court also determined that the jury's verdict was not contrary to the weight of the evidence. Therefore, there was no abuse of discretion by the trial court in refusing to set aside the verdict.

III. Petitioner Was Not Denied Equal Protection Under the Law.

Petitioner contends that due to defense counsel's appeal to ethnic prejudice, petitioner was denied a fair trial. As a factual matter, both parties to the lawsuit are of the same ethnic origin and counsel for both parties made references to same. Implicit in the petitioner's contention that the conduct of the trial of this case violated the Equal Protection Clause is the assertion that petitioner was denied trial by an impartial jury. It seems antithetical to argue prejudice and partiality when the references to which petitioner now objects applied equally to both petitioner and respondent, and when similar, innocuous observations were made by counsel for both sides. In fact, counsel in this case went so far as to explore with potential jurors whether they would be influenced or biased based upon the parties' ethnic origin or immigration status as defense counsel reminded the jury during closing argument, noting, "During jury selection, we also asked you whether you had any strong feelings about lawsuits, and whether you had any feelings as to whether Mr. Hizam, being a person from Yemen, who ... would some day be applying for citizenship to this country, sought the redress of this

court to right what he perceived to be a wrong." Contrary to petitioner's assertions, additional measures were taken to assure that Mr. Hizam would be afforded a fair trial by an impartial jury and the references to which petitioner objects were made for that purpose: to level the playing field and respond to petitioner's counsel's comments.

The intent of the equal protection clause of the Fourteenth Amendment to the constitution is to ensure that all citizens are protected from "intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech,* 120 S.Ct. 1073 (2000), *quoting Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441, 445, 43 S.Ct. 190, 67 L.Ed. 340 (1923), *quoting Sunday Lake Iron Co. v. Township of Wakefield,* 247 U.S. 350, 352, 38 S.Ct. 495, 62 L.Ed. 1154 (1918). The equal protection clause requires that states treat like cases alike but permits them to afford disparate cases different treatment. *Vacco v. Quill,* 521 U.S. 793, 117 S.Ct. 2293, 138 L.Ed. 834 (1997). The mandates of the equal protection clause forbid the state, including employees, agents and officers, from wielding its power in a discriminatory manner. There was no such abuse of power in this case. The New York courts did nothing to afford disparate treatment to petitioner in any sense. Therefore, petitioner was not denied equal protection under the law and has presented no constitutional issue for consideration by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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